IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Application No.4 of 2004
And
Review Petition (St.) No.23207 of 2003
In
Second Appeal No.779 of 2002

1. Shri Janardan Pandurang Lipane,)
Aged 52 years, Occ: Agriculturist,)

2. Shri Pandharinath Pandurang Lipane)
Aged 50 years, Occ:Agriculturist,)

3. Shri Gopal Pandurang Lipane,)
Aged 48 years, Occ:Agriculturist,)

4. Shri Ramchandra Pandurang Lipane,)
Aged 44 years, Occ: Service.)

5. Shri Kashinath Pandurang Lipane,)
Aged 42 years, Occ:Agriculturist,)

6. Smt.Suman Pandurang Lipane,)
Aged 40 years, Occ:Agriculture,)
& Household Nos.1 to 6, are)
residing at Jambhulwadi of)
Ambegaon, Taluka Haveli,)
Dist. Pune.)

7. Sau. Rangubai Shripati Laigude,)
Aged 46 years, Occ : Household,)
residing at Dhayari,)
Taluka - Haveli, Dist. Pune.) .. Applicants /Petitioners

Versus

1. Shri Sadhu Davji Lipane,)
Aged 52 years, Occ: Agriculture)
& Service.)

2. Shri Ghansham Sadhu Lipane,)
Aged 33 years, Occ: Agriculture,)

3. Shri Navnath Sadhu Lipane,)
Aged 30 years, Occ:Agriculture,)

4. Shri Subhash Kaluram Kale,)
Aged 34 years, Occ : Service,)

5. Shri Dattatraya Kaluram Kale,)
Aged 30 years, Occ: Agriculture,)

6. Shri Eknath Kaluram Kale,)
Aged 28 years, Occ: Agriculture,)

7. Shri Suresh Kaluram Kale,)
Aged 22 years, Occ: Agriculture,)

8. Smt. Muktabai Kaluram Kale,)
Aged 63 years, Occ: Household,)
All 1 to 8 residing at Jambhulwadi)
Taluka - Haveli, District - Pune.)

9. Sau. Hirabai Babasaheb Beldare,)
Aged 27 years, Occ: Household,)
Residing at Ambegaon, Budruk,)
Taluka - Haveli, Dist. Pune.)

10. Shri Anil Shivram Kale,)
Aged 25 years, Occ: Agriculture,)

11. Shri Sambaji Shivram Kale,)
Aged 21 years, Occ:Agriculture,)

12. Smt.Ratnabai Shivram Kale,)
Aged 45 years, Occ:Agriculture,)
Nos.10 to 12 all residing at)
Jambulwadi, Taluka - Haveli,)
Dist. Pune.).. Respondents
(Nos.1 to 3 Org.Plffs
& Nos.4 to 12 - Org.
Defendants 8 to 16.)

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Shri L.S.Gaikwad, Advocate for the Applicants/Petitioners.

Shri P.S.Dani, Advocate for the Respondents.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 30th SEPTEMBER, 2004.

JUDGMENT :

1. Heard the learned advocates for the parties. Perused the records. By consent of the parties, both the applications - the application for condonation of delay in filing the review application as well as the review application itself - were taken up for hearing together and are being disposed of by this common judgment.

2. This is an application for condonation of delay in filing the Review Petition in relation to the order passed on 18th November, 2002 in Second Appeal No.779 of 2002 rejecting the Second Appeal for want of substantial questions of law in the matter.

3. It is the case of the applicants that the advocate for the applicants applied for certified copy of the order dated 18th November, 2002 and the same was ready on 18th February, 2003 and the same was delivered to the advocate for the applicants on 6th March, 2003. The applicants, thereafter, contacted their advocate Sri Yogesh Mehta on 16th March, 2003 to inquire about the certified copy of the said order

whereupon, he told the applicants to pay his balance amount of fee of Rs.5,000/-. After collecting the said amount of fees, the applicants came to Mumbai on 15th April, 2003 for collecting the certified copy from the said advocate. Pursuant thereto, after discussing the matter amongst themselves, the applicants decided to file review application, and accordingly they approached another advocate Shri L.S.Gaikwad on 30th April, 2003, who informed the applicants to get all the records in relation to the matter. Thereafter, they came to know that the documents disclosing their rights to the suit property were to be found out and to be gathered by obtaining information from the different places and from different persons and therefore, in the process, it took considerable time, and after collecting the relevant documents, it was revealed to them that the properties have been partitioned long back by their ancestors, and the said evidence in the form of public documents was required to be brought on record as the entire case could be disposed of on the basis of those documents. Since the documents were not on record and for the first time, the applicants could lay their hands on those documents after collecting the same, they came to Mumbai on 15th June, 2003 and handed over all those papers to their advocate Shri L.S.Gaikwad.

It is their further case that due to drought for three years, they had no sufficient funds and they had to collect the same from their relatives and friends for the purpose of filing the review petition, and after collecting the funds from all sources on 27th June, 2003, they again came to Mumbai for filing review petition, which was delayed by more than 187 days.

4. The application for condonation of delay discloses the two grounds, (i) delay in getting the certified copy of the order passed in Second Appeal No.779 of 2002, and (ii) after obtaining the certified copy and contacting another advocate, the applicants realised the need of collecting certain documents and, in the process, took some time to collect the same.

5. In relation to the obtaining of the certified copy, according to the applicants, they received the same on 15th April, 2003. The order in the Second appeal was passed on 18th November, 2002. It is well settled that for the purpose of review petition, there is no need to obtain certified copy of the order. Even without annexing the certified copy of the order, the review petition can be filed. That apart, the application does not disclose the date on which the application for certified copy of the order passed in

Second Appeal was filed. It only refers to the date on which the certified copy was ready for delivery. Even after the certified copy was ready for delivery on 18th February, 2003, there is no explanation as to why it was not collected till 6th March, 2003 by the advocate for the applicants. There is no affidavit of the advocate Shri Yogesh Mehta that he retained the certified copy of the said order with him on the pretext of non payment of his fees of Rs.5,000/-. There is also no explanation as to what prevented the applicants to approach the advocate Shri Gaikwad prior to 30th April, 2003. There are no details given as to from where the documents were collected and why it took 45 days to collect those documents from the day they realised the need for production of such documents on record. That apart, the statement about 45 days' time having been spent for the purpose of collecting those documents made in the application for condonation of delay in filing the review petition is contrary to the statement made by the applicants in the application for review which categorically states that the documents were available with the advocate for the applicants at the stage of the first appeal in the lower appellate Court. Undoubtedly, the appeal was disposed of on 30th April, 2001. If the documents were already available with the advocate for the

applicants at the lower appellate stage prior to 30th April, 2001, the statement that the applicants took 45 days to collect such documents after contacting their advocate Shri Gaikwad on 30th April, 2003 is patently incorrect. In other words, apart from failure to disclose sufficient cause for condonation of delay, the applicants have no hesitation in making incorrect statement apparently to mislead the Court in the matter of the application for condonation of delay.

6. Irrespective of the fact that the petitioners have not been able to disclose sufficient cause for condonation of delay, I am not inclined to reject the review application as the petitioners have raised a very important issue in the application for review, namely as to whether the appellants in Second Appeal can seek to produce additional evidence in support of their claim to the suit property.

7. Perusal of the application for review discloses that the applicants are seeking review on the ground of failure on their part to produce relevant facts and documents on record, and that the said documents which are so relevant and important that the consideration thereof would certainly have an effect on ultimate decision in the matter. The

applicants seek to rely on various documents relating to the period from 1917 till 1994. They are - partition document of 1917; Sale Deed dated 8th October, 1918; Sale Deed dated 13th August, 1925; Gift Deed dated 2nd December, 1931; Gift Deed dated 9th June, 1936; Sale Deed dated 28th April, 1965; Sale Deed dated 8th December, 1972; Sale Deed dated 21st March, 1983; Sale Deed dated 18th February, 1992; and Sale Deed dated 24th January, 1994.

8. It is to be noted that the Second Appeal No.779 of 2002, which was dismissed on 18th November, 2002, was filed against the judgment and decree dated 30th April, 2001 passed by the Additional District Judge, Pune, in Civil Appeal No.617 of 2000 which was preferred against the judgment and decree dated 20th April, 2000 of the Fourth Joint Civil Judge, Junior Division, Pune, in Regular Civil Suit No.292 of 1996. The said suit was apparently filed much after the date of the last document sought to be relied upon in the review petition i.e. on 24th January, 1994. The said last document relates to the year 1994 whereas the suit was filed in the year 1996.

9. Another relevant factor to be noted is that in the review petition, there is a categorical statement

that all the documents, which are sought to be relied upon, were available with the advocate appearing for the applicants in the appellate Court even at the time of filing of the said appeal, however, he did not take care to place them on record as additional evidence.

10. It is to be noted that the delay which is sought to be condoned is in relation to the filing of an application for review of the order passed in the Second Appeal, and the review sought for is on the ground of discovery of new materials in the form of documents as well as certain new facts need to be brought on record. It is the case of the applicants themselves that such documents were available with their advocate at the appellate stage before the lower appellate Court. Yet, the same were not produced as additional evidence. This apparently discloses that there was no discovery of new materials and therefore there is absolutely no ground for review on the basis of the claim of discovery of new materials.

11. Apart from the above facts, even on the point of law, there is apparently no case for review on the ground of discovery of new materials. The order, which is sought to be reviewed in the proposed review application, has been passed in the Second Appeal.

Though a ground of discovery of new materials can be a ground for review of an order passed at the original stage or even at the stage of first appeal, it can hardly be a ground at the stage of Second Appeal. It is settled law that the Second Appeal can be preferred only in case a party is able to make out a substantial question of law for consideration in the matter. Such point has to be disclosed from the materials on record and not on the basis of the additional evidence or extraneous materials. In the Second Appeal, even appreciation of evidence already on record is not permissible except in a rare case, like the finding being totally perverse or contrary to the materials on record. The findings cannot be said to be perverse or contrary to the materials on record when the challenge is on the ground of failure on the part of a party itself to produce the evidence on record.

12. The point as to whether the discovery of new material could be a ground for review in the Second Appeal was under consideration before Delhi High Court in the matter of **Shri Hori Lal v. Shri Sharwan Kumar,** reported in AIR 1993 Delhi 85, and relying upon the decision of our own High Court in the matter of **Hari Ganu Bhandirge v. Hari Ganu Shinde,** reported in AIR 1929 Bombay 225, it was held that discovery of new

evidence on a question of fact though a good ground for review of the decree of the first appellate court is no ground for review of the decree of the second appellate court. Indeed, this Court in **Hari Ganu Bhandirge's case (supra),** had held thus:

> "Discovery of new and important evidence on a question of fact though a good ground for review of the decree of the first appellate court is no ground for review of the decree of the second appellate court; the finding of fact of the lower court being final and binding on second appellate court."

13. Even assuming that the fact about the requirement of such evidence to prove the claim of the applicants came to their knowledge subsequent to the dismissal of the second appeal, it is to be seen that in order to satisfy the requirement under Order 47 Rule 1(c) of the Code of Civil Procedure, it is absolutely necessary for a party to establish that the discovery of new material or evidence was neither within the knowledge of a party when the decree was passed nor the party with due diligent could have laid his hands on such evidence prior to the passing of the

decree. The Madras High Court in the matter of **Shanmugam Servai v. P. Periyakaruppan Servai,** reported in AIR 1996 Madras 411 has clearly observed that a person seeking a review should prove strictly the diligence as clearly spelt out in the said rule which he claims to have exercised and also that the matter or evidence which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive, and bare assertion in the affidavit that the party could not trace the documents earlier or he was not in possession nor in custody of the said documents could not be a ground to seek legal aid provided under the said rule. It is not the proper function of a review proceeding to supplement the evidence or to make it serve the purpose of a merely introducing evidence which might possibly have had some effect upon the result. I am in respectful agreement with the said ruling of the Madras High Court. Applying the same to the facts of the present case, it is apparent that the applicants were fully aware of those documents being in possession of their advocate at the lower appellate stage itself. There is no explanation as to why those documents were not produced at the first appellate stage or even prior to passing of the decree by the trial Court. There is no mention about those documents either at the time of

filing of the second appeal or even in the course of argument when the second appeal was rejected on 18th November, 2002.

13. The Patna High Court in **Hem Narain Singh and Ors. v. Ganesh Singh and Ors.,** reported in AIR 1995 Patna 5 taking note the decisions of the Apex Court in **Moran Mar Basselios Catholicos v. The Most.Rev. Mar Poulose Athanasius,** reported in AIR 1954 SC 526 as well as of the Privy Counsel in **Chhajju Ram v. Neki,** reported in AIR 1922 PC 112, held that merely because the learned counsel for the appellant could not properly explain the legal position, it cannot be a ground for review of the judgment passed in the second appeal. Similarly, merely because the advocate could not conduct the trial properly or could not produce the documentary evidence at the proper stage, that cannot be a ground for review of the judgment or order passed in second appeal. Reliance was placed in the decisions of Madras High Court in **Soosai Anthony D'costa Nicholas D'Costa v. Rancis Roche Anthony Kurush Roche,** reported in AIR 1962 Mad 304 and of Allahabad High Court in **Bhagwati Singh v. Deputy Director of Consolidation and another,** reported in AIR 1977 Allahabad 163.

14. In **Shamsuddin Biswas & Ors. v. Molannessa Bibi & Ors.,** reported in AIR 1926 Calcutta 941, the Division Bench of Calcutta High Court held that High Court in second appeal cannot be said to require any document to be produced or any witness to be examined to enable it to pronounce judgment on a question of fact.

15. In **P.V.Subba Raja v. S.S.Narayana Raja & Ors.,** reported in AIR 1954 Madras 1074, the learned Single Judge of the Madras High Court held that since it is not competent to second appellate Court to decide an issue of fact or to give finding except on the evidence on record, it goes without saying that the second appellate Court cannot admit evidence and give its own decision on a question of fact. It was specifically held that :-

> "It is not every provision in O.41 that could be said to automatically apply to a proceeding in second appeal by virtue of O.42, R.1 but only such provisions as may reasonably be applied having in view of the provision of Ss.100 and 103, and the limited scope of the jurisdiction of the second appellate Court in matters affecting questions of fact. The

proper view to be taken therefore is that it is not competent to admit additional evidence in second appeal. That is the view which has been consistently held by almost all the High Courts in India and that view is in accordance with the provisions of the Code governing second appeals."

16. Considering all the aspects of the matter, there is no sufficient case made out for review of the order passed in the second appeal. Hence, though the application for condonation of delay is allowed and delay is condoned, the review application is dismissed with no order as to costs.